SIXTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

Case No. 6D23-1217
Lower Tribunal No. 20-CF-014445-AOR

WESTLEY DESHUND BRAND,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Appeal from the Circuit Court for Orange County
Luis Fernando Calderon, Judge.

February 3, 2023

COHEN, J.

Westley Brand appeals following his conviction for possession of a firearm by a convicted felon.[1] The sole issue on appeal involves an allegedly improper argument by the prosecutor during closing argument.

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[1] This case was transferred from the Fifth District Court of Appeal to this Court on January 1, 2023.

At trial, the State called sheriff's deputy Captain Barrett. He testified that he came into contact with Brand as part of an investigation. As he approached Brand, Brand told him that he had a firearm in his possession.

Deputy Worth testified and corroborated the captain's testimony that Brand voluntarily stated he had a gun in his back pocket. Deputy Worth handcuffed Brand and retrieved a black handgun. Deputy Worth was wearing a body camera that showed the events, although the sound was not turned on before Brand said he had a gun.

Brand testified and denied both possessing a firearm and making any statements admitting to being in possession of a firearm. Brand acknowledged having been convicted of three prior felonies.

The trial court read the jury instructions prior to the lawyers' closing arguments. During the rebuttal portion of his closing argument, the prosecutor argued:

> I submit to you, that the defendant's testimony should not be relied upon. Why is that? There's[sic] seven factors right here. Did the witness seem to have an opportunity to see and know the things about which the witness testified? Did the witness seem to have an accurate memory . . . . He was being very evasive . . . . Has the witness been convicted of a felony? Deputy Worth has not been convicted of a felony.

Brand objected on the grounds that the State was arguing "facts not in evidence." The prosecutor immediately responded to the judge at the bench, "That's fine, Your Honor. State's not going to argue that." The judge overruled the objection. The matter was never raised again.

The defense objection is well taken. There was no evidence Deputy Worth had ever been convicted of a felony, and the trial court should have sustained the objection. Nonetheless, we affirm Brand's conviction. We have reviewed the entire record and are satisfied there is no reasonable possibility that this brief, isolated comment affected the verdict in the trial. See DiGuilio v. State, 491 So. 2d 1129 (Fla. 1986).

No doubt, the jury was required to assess the credibility of the witnesses. The jury was properly instructed on how to assess credibility. Further, the judge told the jury that what the lawyers say is not evidence, and that they are to rely on their own recollection of the evidence, rather than deferring to the lawyers' arguments.

The prosecutor's ill-advised comment was isolated and brief. We are satisfied beyond a reasonable doubt that the jury's verdict was not influenced when the prosecutor suggested during closing argument that a police officer was not a convicted felon. We find the error to be harmless and affirm appellant's conviction.

AFFIRMED.

SASSO, C.J., and NARDELLA, J., concur.

Matthew J. Metz, Public Defender, and Steven N. Gosney, Assistant Public Defender, Daytona Beach, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Deborah A. Chance, Assistant Attorney General, Daytona Beach, for Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF TIMELY FILED